No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN, Postmaster General,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

Relevant Docket Entries from U.S. District Court (D. Colo.), No. 10-cv-02201 1

Relevant Docket Entries from U.S. Court of Appeals for the Tenth Circuit, No. 13-1096 6

MATERIALS IN DISTRICT COURT RECORD

First Amended Complaint (excerpt) 8

Final Agency Decision 22

Answer to First Amended Complaint (excerpt) 47

Declaration of David Knight (excerpt) 50

Email from Knight to Ehrenshaft 53

Email from Podio to Knight 54

Deposition of OIG Agent Mason (excerpt) 55

December 16, 2009 Agreement 60

Declaration of Robert Podio 62

EEO Complaint, initiated March 22, 2010 64

RELEVANT DOCKET ENTRIES

U.S. District Court District of Colorado (Denver)

CIVIL DOCKET FOR
CASE #: 1:10-CV-02201-LTB-KMT

Date Filed	#	Docket Text
09/08/2010	1	COMPLAINT-CIVIL RIGHTS (JURY TRIAL DEMAND) against John E. Potter (Filing fee $ 350, Receipt Number 031136) Summons Issued, filed by Marvin Green. (Attachments: # 1 Civil Cover Sheet, # 2 Receipt)(sah,) Modified on 9/9/2010 to correct the last name of the plaintiff (sah,). (Entered: 09/09/2010)
07/26/2011	20	AMENDED COMPLAINT against John E. Potter, filed by Marvin Green. (Mosby, John) (Entered: 07/26/2011)
11/14/2011	27	ANSWER to 20 Amended Complaint by Patrick R. Donahoe. (Cohen, Nathalie) (Entered: 11/14/2011)
11/12/2012	90	MOTION for Summary Judgment by Defendant Patrick R. Donahoe. (Attachments: # 1 Ex. A – Ehrenshaft Declaration, # 2 Ex. A, Att. 1 – Nov. 25, 2009, Letter, # 3 Ex. A, Att. 2 – April

21-July 2, 2009, Email Chain, # 4 Ex. A, Att. 3 – May 13, 2009, Step B Decision, # 5 Ex. A, Att. 4 – Aug. 17, 2009, Step B Decision, # 6 Ex. A, Att. 5 – Oct. 21, 2009, Step B Decision, # 7 Ex. A, Att. 6 – Oct. 21, 2009, Step B Decision, # 8 Ex. A, Att. 7 – Oct. 29, 2009, Step B Decision, # 9 Ex. A, Att. 8 – Nov. 10, 2009, Step B Decision, # 10 Ex. A, Att. 9 – Nov. 10, 2009, Step B Decision, # 11 Ex. A, Att. 10 – Nov. 10, 2009, Step B Decision, # 12 Ex. A, Att. 11 – Nov. 23, 2009, Step B Decision, # 13 Ex. A, Att. 12 – Nov. 19, 2009, Email, # 14 Ex. A, Att. 13 – Nov. 24, 2009, Emails, # 15 Ex. A, Att. 14 – Nov. 24, 2009, Step B Decision, # 16 Ex. A, Att. 15 – Nov. 24, 2009, Step B Decision, # 17 Ex. A, Att. 16 – Randleman Atatements, # 18 Ex. A, Att. 17 – Pay records, # 19 Ex. A, Att. 18 – Dec. 15. 25, 2009, Email, # 20 Ex. A, Att. 19 – EEO Complaint – 4E-800-0070-10, # 21 Ex. A, Att. 20 – EEO Complaint – 4E-800-0119-10, # 22 Ex. B – Ehrenshaft Depo. Excerpts, # 23 Ex. C – Knight Declaration, # 24 Ex. C, Att. 1 – Oct. 15, 2009, Email Attaching Congressional Inquiry, # 25 Ex. C, Att. 2 – Certified Mail Tracking Information, # 26 Ex.

C, Att. 3 – Certified Mail Tracking Information, # 27 Ex. C, Att. 4 – Emergency Placement letter, # 28 Ex. C, Att. 5 – Dec. 12, 2009, Emails, # 29 Ex. C, Att. 6 – Dec. 15, 2009, Email and Draft Settlement Agreement, # 30 Ex. C, Att. 7 – Dec. 15, 2009, Email, # 31 Ex. C, Att. 8 – Signed Settlement Agreement, # 32 Ex. D – Knight Depo. Excerpts, # 33 Ex. E – Smith Depo. Excerpts, # 34 Ex. F – Plaintiff's Interrogatory Response, # 35 Ex. G – Green Depo. Excerpts, # 36 Ex. H – Green Depo. Ex. 32 – August 14, 2008, EEO Complaint, # 37 Ex. I – Green Depo. Ex. 33 – May 14, 2009, EEO Informal Complaint, # 38 Ex. J – Green Depo. Ex. 34 – July 17, 2009, EEO Informal Complaint, # 39 Ex. K – Acknowledgment and Order, # 40 Ex. L – Notice of Right to File, # 41 Ex. M – Podio Depo. Excerpts, # 42 Ex. N – Mason Depo. Excerpts, # 43 Ex. O – Green Depo. Ex. 52 – Acknowledgement of Rights, # 44 Ex. P – Green Depo. Ex. 35 – March 22, 2010, EEO Infromal Complaint) (Cohen, Nathalie) (Entered: 11/12/2012)

12/19/2012	106	BRIEF in Opposition to 90 MOTION for Summary Judgment filed by Plaintiff Marvin Green. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit, # 20 Exhibit, # 21 Exhibit, # 22 Exhibit, # 23 Exhibit, # 24 Exhibit, # 25 Exhibit, # 26 Exhibit, # 27 Exhibit, # 28 Exhibit, # 29 Exhibit, # 30 Exhibit, # 31 Exhibit, # 32 Exhibit) (Mosby, John) (Entered: 12/19/2012)
01/11/2013	124	REPLY to Response to 90 MOTION for Summary Judgment filed by Defendant Patrick R. Donahoe. (Attachments: # 1 Ex. AA – Green Depo. Excerpts, # 2 Ex. BB – Green Depo. Ex 40 – Grievance Chart, # 3 Ex. CC – Ehrenshaft Depo. Excerpts, # 4 Ex. DD – Knight Depo. Excerpts, # 5 Ex. EE – Podio Depo. Excerpts) (Cohen, Nathalie) (Entered: 01/11/2013)

02/04/2013	129	ORDER granting 90 Defendant's Motion for Summary Judgment. This action is dismissed and Defendant is awarded costs, by Judge Lewis T. Babcock on 2/4/2013. (eseam) (Entered: 02/04/2013)
02/07/2013	133	FINAL JUDGMENT re: 129 Order on Motion for Summary Judgment, by Clerk on 2/7/13. (sgrim) (Entered: 02/07/2013)
03/08/2013	138	NOTICE OF APPEAL as to 133 Clerk's Judgment by Plaintiff Marvin Green (Filing fee $ 455, Receipt Number 1082-3260827) (Mosby, John) (Entered: 03/08/2013)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
DOCKET # 13-1096

Date Filed	Docket Text
03/11/2013	Civil case docketed. Preliminary record filed. DATE RECEIVED: 03/11/2013. Docketing statement due 03/25/2013 for Marvin Green. Transcript order form due 03/25/2013 for Marilyn Cain Gordon, Elisa Julie Moran and John Mosby. Notice of appearance due on 03/25/2013 for Patrick R. Donahoe and Marvin Green [13-1096]
05/16/2013	Appellant/Petitioner's brief filed by Marvin Green. 7 paper copies to be provided to the court. Served on 05/16/2013 by email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. -- [Edited 05/20/2013 by AD - brief cited deficient 5-20-13] [13-1096]- -[Edited 05/29/2013 by LG, brief deficiency corrected via errata on 5/29/2013] JM
07/29/2013	Appellee/Respondent's brief filed by Mr. Patrick R. Donahoe. 7 paper copies to be provided to the court. Served on: 07/29/2013.

	Manner of service: email. Oral argument requested? No. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1096] PF
08/15/2013	Appellant/Petitioner's reply brief filed by Marvin Green. 7 paper copies to be provided to the court. Served on 08/15/2013. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1096] JM
11/18/2013	Case argued by John Mosby for the Appellant, Paul Farley for the Appellee, and submitted to Judges Hartz, McKay and Matheson. [13-1096]
07/28/2014	Affirmed in Part, Reversed in Part and Remanded; Terminated on the merits after oral hearing; Written, signed, published; Judges Hartz (authoring), McKay and Matheson. Mandate to issue. [13-1096]
07/28/2014	Judgment for opinion filed. [13-1096]
09/19/2014	Mandate issued. [13-1096]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 10-cv-02201-LTB-KMT

MARVIN GREEN,

Plaintiff,

v.

PATRICK R. DONAHOE, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,

Defendants.

FIRST AMENDED COMPLAINT
(JURY TRIAL DEMAND)

Plaintiff, Marvin Green ("Green"), by and through his attorneys, John Mosby, Marilyn Cain Gordon and Elisa Moran, states and alleges the following as his claims for relief:

I. INTRODUCTION

1. This lawsuit seeks monetary damages, injunctive, and equitable relief, for Defendant's willful pattern of retaliatory conduct that was intentionally designed to force Marvin Green to retire from the United States Postal Service.

2. Green alleges that the agency retaliated against him because he opposed discrimination on August 14, 2008, May 12, 2009, and July 17, 2009; and because he participated in Title VII protected activity in 2008 and 2009; the last protected activity occurred on or about November 10, 2009.

3. Green's opposition to discrimination and his participation in EEO activity are protected under Section 704 of Title VII of the Civil Rights Act of 1964, as amended.

II. JURISDICTION

4. Green has met all statutory requirements and jurisdictional prerequisites for his Title VII civil rights claims.

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331 and §1343, this being an action brought under Title VII of the Civil Rights Act of 1964, as amended and the Civil Rights Act of 1991.

III. PARTIES

6. Marvin Green, a black American, is and was a resident of the state of Colorado at all times pertinent herein.

7. Patrick R. Donahoe is the Postmaster General of the United States Postal Service. The Postal Service is a federal governmental agency.

III. FACTUAL ALLEGATIONS

8. On August 4, 1973, Green began his employment with the USPS.

9. On February 9, 2010, Green signed his retirement papers, effective on March 31, 2010.

10. During Green's employment with the agency, he worked in management for 25 years, including 14 years as a postmaster,

11. During Green's employment with the agency, he had an unblemished employment record and was never disciplined.

12. Starting in 1973, Green's career blossomed. He advanced from a position of letter carrier to Postmaster.

13. Green's most recent promotion was in 2002, to an EAS-22 level Postmaster at the Englewood Colorado Post Office. The Englewood Post Office is in the Colorado/Wyoming district. Green supervised approximately 300 employees and 4 smaller post offices.

14. Since at least 1985, the agency has used its Officer-in-Charge program ("OIC"), as one of its mechanisms to prepare and advance employees, including postmasters, to the next higher level position.

15. The OIC program provides employees with opportunities to serve in assignments or details at the next higher level position. When an OIC assignment or detail ends, the employee, if qualified for the next higher level, is evaluated as "Ready."

16. Green joined the OIC program early in his career. On September 29, 1986, Green received his first OIC postmaster assignment, which lasted 7 months.

17. At the end of that first assignment, in 1987, Green received the following evaluation:

> "Mr. Green worked well with the employees and the community. He assisted his employees in upward mobility and maintained compliance with FLSA.

> The knowledge and job experience gained by Marvin during this detail have provided him a good background for promotional or additional detail opportunity. Mr. Green completed this assignment in an excellent manner."

18. Green's last OIC assignment occurred on September 30, 2006, as an EAS-24 postmaster at the Fort Collins, Colorado Post Office.

19. The Fort Collins' assignment ended on September 1, 2007. Green was rated as "Ready" for an EAS-24 postmaster position.

20. In early 2008, an EAS-24 postmaster position opened at the Boulder, Colorado Post Office.

21. Green had been a manager at the Boulder Post Office from 1989 to 1996. Green had also served in an OIC assignment as an EAS-24 postmaster at the Boulder Post Office.

22. In February 2008, Green submitted his OIC application officially requesting to be detailed to the open Boulder postmaster position.

23. Greg Christ, Green's immediate supervisor, was the decision-maker for the Boulder OIC detail. Christ was also ultimately responsible for selecting the permanent Boulder postmaster.

24. Christ, in contradiction to the OIC policies, never responded to Green's application for the Boulder OIC detail.

25. Instead, after Christ received Green's application, he contacted a non-black postmaster and informed that employee that he was being detailed into the Boulder postmaster position.

26. The individual Christ detailed had never joined the agency's OIC program, had never requested a detail to a higher level position, and had never competed for a postmaster position.

27. In July 2008, Christ selected this same individual to permanently fill the Boulder postmaster position.

28. On July 11, 2008, Green contacted an EEO counselor.

29. On August 14, 2008, Green filed a formal EEO complaint alleging denial of promotion based upon his race.

30. Shortly thereafter, Christ, who Green alleged discriminated against him, started retaliating by bullying and harassing Green.

31. On October 21, 2008, the agency completed investigating Green's EEO complaint.

32. On November 7, 2008, Green submitted his request to the agency for a hearing before the Equal Employment Opportunity Commission.

33. After Green requested an EEOC hearing, Christ's retaliatory conduct escalated and continued into 2009.

34. During this time, Green was a member of the National League of Postmasters.

35. Richard Sprague was the NLP's Colorado Branch President.

36. Around March 2009, Green sought Sprague's assistance to stop the agency's retaliatory harassment.

37. On March 10, 2009, Sprague and Green met with Christ to protest his retaliatory bullying, threatening, and harassing conduct toward Green.

38. After the March 10, 2009 meeting, Christ started harassing Green on a daily bases; he would give Green instructions, then go behind Greens' back and talk to Green's staff and give them different instructions.

39. In 2009, Charmaine Ehrenshaft was the Manager of Labor Relations for the agency's Colorado/Wyoming District.

40. Ehrenshaft, in the course of her duties, was aware of EEO activity and EEO complaints filed in the Colorado/Wyoming district.

41. Ehrenshaft normally communicated with postmasters through their supervisors regarding Labor Relations' matters; but in March or April 2009, she started directly contacting Green over grievance issues.

42. Around March or April 2009, Green started receiving harassing emails and correspondence from both Ehrenshaft and Christ.

43. On May 12, 2009, Green again contacted Sprague regarding the harassment. Sprague wrote the following to Christ:

> "I'm a little confused by all this micro managing of Englewood and your going behind the PM's back to talk to his staff. My confusion is why you would take one of our best performing offices (an office that at mid year is achieving most goals) and feel the need not to [sic] more supportive of this PM .

* * *

> If this is the way we treat one of the good offices then I'm to assume you are giving the non performing office [sic] three times the attention Marvin is getting. Last month you agreed to work on the communication between you and Marvin however I must be honest, to me all that happened is we got more micro managing. I ask you again to work with Marvin in away (sic) that is beneficial [sic] the Postal Service. We need PM's like Marvin more than ever."

44. On May 14, 2009, Green initiated EEO counseling and filed an informal EEO complaint alleging that the agency was retaliating against him.

45. Around this time, Green learned that Christ was retiring from the agency.

46. However, Ehrenshaft's contact with Green increased and her emails started including negative criticism of Green's day to day operation of the Englewood Post Office.

47. On July 2, 2009, Green emailed the following to Ehrenshaft, "Char, it is time for the harassing e-mails to stop...".

48. On or about July 17, 2009, Green engaged in EEO activity by contacting the agency's EEO office to file an informal EEO complaint alleging retaliation.

49. On August 12, 2009, the agency's EEO office informed Green that it had "concluded the processing of your claim of retaliation initiated on May 14, 2009" and informed him of his right to file a formal EEO complaint within 15 days.

50. In its August 12, 2009 letter, the agency's EEO office also stated:

> "For your information, the agency (USPS Law Department) was going to file a request to amend this current complaint into your prior EEO case #4E-800-0232-08 which is currently pending at the pre-hearing stage with the EEOC (Equal Employment Opportunity Commission (EEOC). The request for amendment has not been submitted as of this date."

51. On or about November 10, 2009, the EEOC gave the agency notice that the discovery process on Green's 2008 EEO complaint would begin and that the complaint would be set for hearing.

52. On November 25, 2009, while Green was at home on leave for the Thanksgiving holiday, Ehrenshaft had a certified letter delivered to Green's home that stated:

> "You are instructed to appear for an investigative interview *regarding allegations of non-compliance in the grievance procedure.* This interview will be held on Wednesday, December 2, 2009 at 1:00 pm in the Denver, Colorado Administration Building, Labor Relations Conference Room."

53. Green advised Ehrenshaft that Robert Podio, President of the Colorado Chapter of the National Association of Postmasters of the United States, would be representing him in this meeting.

54. On December 1, 2009, Podio, via email, informed Ehrenshaft that the meeting needed to be rescheduled. December 11, 2009, was agreed upon as the new date.

55. On December 9, 2009, Green held his monthly meeting with his then supervisor, Jarmin Smith. Green asked Smith, why was Ehrenshaft investigating him?

56. Smith stated he did not know. But he informed Green that Ehrenshaft had contacted him and requested he provide her with anything he had on Green.

57. Smith informed Ehrenshaft that he was not having any problems with Green, but told her he would forward to her a file that Greg Christ kept on Green, which Christ had emailed to him.

58. On December 11, 2009, the investigative interview occurred.

59. During the interview, Green was interrogated for, inter alia, intentionally delaying the mail.

60. Green had received no notice that "intentionally delaying the mail" was going to be a topic at the investigative interview.

61. Ehrenshaft and her boss, David Knight, interrogated Green for approximately two hours.

62. When the interview ended, Green was preparing to leave the room when two agents from the Office of Inspector General ("OIG") appeared.

63. The agents informed Green that they had been ordered to interrogate him for criminal conduct.

64. The agents informed Green that "intentionally delaying the mail was a felony offense," for which criminal charges could be filed.

65. Green informed the OIG agents that he had already been investigated for "intentional delaying the mail."

66. At the conclusion of the OIG interrogation, the agents informed Green that the intentional delaying the mail issue would be referred to the United States Attorney's Office, and that the U.S. Attorney's Office would decide whether criminal charges would be filed.

67. When the OIG interrogation ended, Ehrenshaft and Knight reappeared.

68. Green was ordered, without discussion or explanation, to sign an Emergency Placement memorandum.

69. Ehrenshaft and Knight ordered Green to immediately surrender his Agency identification and Agency cell phone.

70. Ehrenshaft and Knight ordered Green not to return to the Englewood Post Office.

71. The Emergency Placement memo informed Green of "Emergency Placement in Off-Duty Status" and further stated, "The reason(s) for this action is/are: Disruption of day-today postal operations." The memoranda also stated, "The employee is returned to duty status when the cause for **nonpay status** ceases." (Emphasis added).

72. On or about December 15, 2009, Podio contacted Green and informed Green that the agency had forwarded to him (Podio) a settlement document.

73. Podio informed Green that he had received the agency's settlement document, via email, from Ehrenshaft.

74. The terms of the agency's settlement document required Green, in order to be paid while on Emergency Leave, to take a downgrade to an EAS-13 postmaster position; and to either retire from the agency or transfer by March 31, 2010, to a position 400 miles from Denver, in the state of Wyoming.

75. The terms of the agency's settlement document required Green, if he transferred to the EAS-13 postmaster position, to take an approximately $38,784.00 reduction in salary.

76. The terms of the agency's settlement document required Green, in order to get his next paycheck, to use his annual leave from December 14, 2009 thru December 18, 2009.

77. The terms of the agency's settlement document required Green, in order to be paid after December 18, 2009, to use his sick leave from December 21, 2009 thru March 31, 2010.

78. The terms of the agency's settlement document allowed Green's annual and sick leave to be paid at his current EAS-22 salary until March 30, 2010.

79. After Podio informed Green of the agency's terms for Green to get paid, Green asked Podio why the agency was downgrading him to a EAS-13 and forcing him to transfer to another post office to get paid.

80. Podio told Green that this was the best deal he could get and that it could take up to a year before Green received a paycheck or got a hearing on the Emergency Leave/nonpay status issue.

81. Green stated to Podio "this ain't right." Podio then advised Green that the agency's settlement document did not require Green to waive his EEO rights to file a complaint on any of the agency's actions.

82. Green signed the agency's settlement document on December 16, 2009.

83. On February 9, 2010, Green signed his retirement papers, effective March 31, 2010.

84. On March 22, 2010, Green contacted the agency's EEO office to file an informal EEO complaint.

85. On April 26, 2010, Green filed a formal EEO complaint alleging that he was forced to retire (constructively discharged) based on retaliation.

* * *

FIFTH CLAIM FOR RELIEF
Civil Rights Violation of Title VII
(Constructive Discharge)

107. Green incorporates by reference paragraphs 1-85 above.

108. Title VII's anti-retaliation provision promotes the statute's primary objective of ensuring a workplace free from discrimination on the basis of race, ethnicity, religion or gender "[b]y preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of [Title VII's] basic guarantees."

109. Green has suffered an adverse action based upon retaliation. An "adverse action" is one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

110. Green asserts that after he engaged in activity protected under Title VII, the agency's retaliatory acts included, but were not limited to, a calculated pattern of harassment, bullying, insults, humiliation, and unjustified disciplinary actions. The agency sought to and did intentionally inflict severe emotional distress upon Green that has resulted in emotional injury for which he seeks damages.

111. Green asserts a causal connection between his protected activities and all subsequent adverse employment actions taken against him by the agency.

112. Green asserts that the agency forcing him to retire was based upon retaliatory motive, in violation of Title VII, and that the agency made his working conditions so intolerable that a reasonable person in his position would feel compelled to retire. Green asserts this as a separate actionable claim.

PRAYER FOR RELIEF

Plaintiff Green prays for the following relief:

A. As a direct and proximate result of the agency's actions, Green has been emotionally harmed and continues to suffer damages. Green prays for damages as may be proven at trial for this harm.

B. Reinstatement to his rightful place;

C. Award back pay and all benefits;

D. Alternatively, award appropriate Front Pay;

E. Award all actual and compensatory damages;

F Award attorney fees, costs, and expert witness costs and fees;

G. Award interest from the earliest possible date, continuing until all damages are collected;

H. Grant all other injunctive and appropriate relief at law and in equity as this Court deems just and proper.

PLAINTIFF DEMANDS A JURY OF SIX

Respectfully submitted

s/John Mosby
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UNITED STATES POSTAL SERVICE
EQUAL EMPLOYMENT OPPORTUNITY CASE
IN THE MATTER OF:

Marvin Green Complainant	Agency Case No. 4E-800-0119-10
v.	
John E. Potter, Postmaster General, c/o Western Area Operations Respondent.	Formal Filed: April 26, 2010

FINAL AGENCY DECISION –MIXED CASE

Introduction

Pursuant to Equal Employment Opportunity Commission (EEOC) regulations at 29 CFR § 1614.302(d) for mixed case complaints, this is the final agency decision of the U.S. Postal Service regarding the complaint of discrimination identified above.

Statement of Claim

The complainant alleged discrimination based on Retaliation (Prior EEO Activity) when he was forced to retire from his job as Postmaster, Englewood, Colorado on an unspecified date.[1]

[1] In his affidavit, the complainant clarified that he retired effective March 31, 2010.

Procedural Dismissal

The Commission describes an aggrieved employee as one who suffered a present harm or loss with respect to a term, condition or privilege of employment for which there is a remedy. See Diaz v. Department of the Air Force, EEOC Request No. 05931049 (April 22, 1994). To state a claim under Commission regulations, an employee must allege and show an injury in fact. Specifically, an employee must allege and show "direct, personal deprivation at the hands of the employer"; that is, a present and unresolved harm or loss affecting a term, condition or privilege of his or her employment. See Hobson v. Department of the Navy, EEOC Request No. 05891133 (March 2, 1990).

In the instant case, the complainant ratified the terms of the December 16, 2009 settlement agreement when he accepted the benefits. A fair reading of the agreement reveals that he was afforded significant benefits: given a saved salary; the Agency wouldn't pursue charges; allowed to use his leave; given the choice to retire or report to a new job; and was allowed to continue his career. Clearly, it is not a constructive discharge if one is given a choice. The complainant had the choice to retire, accept the new job, or not sign the agreement and defend himself against any potential charges. Further, there is no evidence in the record that he was coerced into signing the agreement. Dorrall v. Department of the Army, 201 F.3d 1375, at 1380 (Fed.Cir. 2002) "To establish involuntariness on the basis of coercion, an employee must show that the Agency effectively imposed the terms of the employee's resignation or retirement, that the employee had no realistic alternative but to resign or retire, and the employee's resignation or retirement was the result of

improper acts by the Agency." Wade v. Department of Agriculture, 60 MSPR 306, at 308-309 (1994) "Settlement presumed voluntary unless sufficient evidence of duress, coercion, or appellant misled." It is noteworthy that the complainant had the assistance of a representative at all times and both of them signed the settlement agreement.

Likewise, a Collateral Attack on Settlement Agreement also fails to state a claim. Mahoney v. Department of Labor, 56 MSPR 69, at 71-72 (1992); Sanders v. Department of Treasury, 83 MSPR 370, at 374 (2001) Appellant cannot prevail in an involuntary retirement appeal where the retirement results from a settlement without convincing the Board that the initial decision and settlement should be set aside.

Additionally, Equal Employment Opportunity Commission (EEOC) Regulations 29 C.F.R. 1614.107(a)(1) provide that the agency shall dismiss an entire complaint that states the same claim that is pending before or has been decided by the agency or Commission. The Commission has held that the same claim is one that sets forth identical matters. Terhune v. U.S. Postal Service, EEOC Request No. 05950907 (July 18, 1997). For purposes of determining whether a new complaint states the same claim, the Commission focuses on the action(s) or practice(s) of the agency about which the complainant complains. Meros v. Department of Commerce, EEOC Request No. 05950690 (January 10, 1997).

The Commission has long held that a complainant cannot raise an issue previously raised during EEO counseling. See Rebello v. U.S. Postal Service, EEOC Request No. 05980211 (June 24, 1999).

The record establishes that the complainant initiated counseling on an identical complaint on January 7, 2010 in Agency Case Number 4E-800-0070-10 wherein he alleged, "since I filed my informal EEO complaint in July, 2008, I have suffered continuous harassment . . . On December 11, 2009, after over a year of harassment, I was removed from my Postmaster position." The record establishes that the complaint was not resolved, he filed a formal complaint on February 17, 2010, and his complaint was procedurally dismissed on February 27, 2010. He subsequently filed an appeal with the EEOC Office of Federal Operations on or about March 23, 2010 and a decision is still pending.

In the instant complaint, the complainant is alleging a constructive discharge wherein he was forced to retire. However, the alleged intolerable incidents comprising the constructive discharge are the same incidents raised in Agency Case Number 4E-800-0070-10. He is in essence attempting to resurrect the same claim that was previously raised in Agency Case Number 4E-800-0070-10, which is currently pending a decision before the EEOC.

Accordingly, pursuant to 29 C.F.R. 1614.107 (a) (1), the complainant's claim is dismissed for failure to state a claim, for constituting a collateral attack on a settlement agreement, and for stating the same claim that is pending before or has been decided by the agency or Commission. Assuming, but only for the sake of argument, that the allegation is appropriate for adjudication on its merits, this decision will, in the alternative, address the merits of the claim.

Chronology

The complaint was processed in accordance with applicable Equal Employment Opportunity Commission (EEOC) Regulations, 29 C.F.R., §1614.103 *et. seq.* Following a Postal Service investigation, the complainant was provided a copy of the investigative file and notified of the forthcoming final agency decision on the merits. Thus, in accordance with EEOC Regulation 29 C.F.R. § 1614.302(d) *et seq.*, this decision is being issued on the merits of the complaint.

Applicable Law

Disparate Treatment

The United States Supreme Court established a burden-shifting framework for analyzing claims of discrimination in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), and subsequently refined that analysis in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The McDonnell Douglas and Burdine approach involves a three-step process when a complainant alleges intentional discrimination based on a disparate treatment theory. The Equal Employment Opportunity Commission has adopted this approach in its decision making. Downing v. U.S. Postal Service, EEOC Appeal No. 01822326 (September 19, 1983); Jennings v. U.S. Postal Service, EEOC Appeal No. 01932793 (April 13, 1994); and Saenz v. Department of the Navy, EEOC Request No. 05950927 (January 9, 1998). A complainant alleging discrimination must first demonstrate that there is some substance to his or her claim. To satisfy this burden, the complainant must establish a *prima facie* case of discrimination for each of the bases of discrimination alleged by a preponderance of the

evidence. Fumco Construction Company v. Waters, 438 U.S. 576 (1978).

Although a complainant may establish a *prima facie* case by presenting direct evidence of discrimination, the more frequent method of establishing a *prima facie* case is through circumstantial evidence by showing that he or she: (1) belongs to a protected class; (2) was subjected to an adverse employment action; and (3) was treated differently in this regard than similarly situated individuals who were not members of the protected group. Mayberry v. Vought Aircraft Company, 55 F.3d 1086, 1090 (5th Cir. 1995); Mitchell v. Toledo Hospital, 964 F.2d 577, 582-83 (6th Cir. 1992). The failure to establish a specific element of a *prima facie* case may be overcome by presenting evidence of agency actions from which an inference of discrimination could be drawn if they remained unexplained. Day v. U.S. Postal Service, EEOC Appeal No. 01996097 (September 18, 2000).

Once a *prima facie* case has been established, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its action. Fumco, 438 U.S. at 578. See also St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). The employer need not persuade the trier of fact that the proffered reason was its actual motivation but merely needs to raise a genuine issue of fact as to whether it discriminated against the complainant. Burdine, 450 U.S. at 254; Keval v. Commodity Futures Trading Commission, EEOC Appeal No. 01832127 (November 2, 1984); Hollis v. Department of Veterans' Affairs, EEOC Appeal No. 01934600 (May 3, 1994). If the agency offers no adequate explanation for the discrepancy in

treatment between the complainant and similarly situated employees, the agency does not carry its burden of production and the complainant prevails on the basis of the inference of discrimination created by the *prima facie* case. Frady v. U.S. Postal Service, EEOC Appeal No. 01A05317 (January 10, 2003); Houston v. Department of Veterans' Affairs, EEOC Appeal No. 01976054 (August 27, 1999); and Parker v. U.S. Postal Service, EEOC Request No. 05900110 (April 30, 1990).

If the employer meets this burden, any presumption of discrimination created by the *prima facie* case disappears; it simply "drops from the case." Hicks, 509 U.S. at 507; U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983). See also Hernandez v. Department of Transportation, EEOC Request No. 05900159 (June 28, 1990) and Peterson v. Department of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990). The complainant can then prevail only if he or she proves that the employer's reasons are not only pretext but are pretext for discrimination. Hicks, 509 U.S. at 507 and 516; Nichols v. Grocer, 138 F.3d 563, 566 (5th Cir. 1998); Swanson v. General Services Administration, 110 F.3d 1180, 1185 (5th Cir. 1997). See also Papas v. U.S. Postal Service, EEOC Appeal No. 01923753 (March 17, 1994) and Bradford v. Department of Defense, EEOC Appeal No. 01940712 (September 20, 1994). Thus, the complainant cannot create a factual issue of pretext based merely on personal speculation that there was discriminatory intent. Southard v. Texas Board of Criminal Justice, 114 F.3d 539, 555 (5th Cir. 1997); Lyles v. U.S. Postal Service, EEOC Appeal No.

01A11110 (May 22, 2002); and Nathan v. U.S. Postal Service, EEOC Appeal No. 01995788 (August 29, 2001).

Pretext involves more than a mistake. It means that the reason offered by management is factually baseless, is not the actual motivation for the action, or is insufficient to motivate the action. Tincher v. Wal-Mart Stores, Inc., 118 F.3d 1125, 1130 (7th Cir. 1997) and Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997). The complainant always carries the "ultimate burden of persuading the trier of fact that he has been the victim of intentional discrimination." Burdine, 450 U.S. at 254 and Hicks, 509 U.S. at 511.

At all times, the ultimate burden of persuasion remains with the complainant. Board of Trustees of Keene College v. Sweeney, 439 U.S. 24, 25 n.2 (1978). This burden was reaffirmed and clarified in St. Mary's Honor Center v. Hicks, *supra.,* where the Court held that in order to impose liability upon an employer for discriminatory employment practices, an ultimate finding of unlawful discrimination is required whether or not the employer's explanation for its action was believable. See also Brewer v. U.S. Postal Service, EEOC Appeal No. 01941786 (June 21, 1994) and Montoya v. Department of Housing and Urban Development, EEOC Appeal No. 01940999 (August 4, 1994).

Retaliation

To establish a *prima facie* case based on reprisal, a complainant must show that: (1) he or she engaged in prior protected activity; (2) the agency official was aware of the protected activity; (3) he or she was subsequently disadvantaged by an adverse employment action or adverse treatment; and (4) there is a causal

link between the protected activity and adverse action/treatment. Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976); Manoharan v. Columbia University College of Physicians and Surgeons, 842 F.2d 590, 593 (2nd Cir. 1988); Coffman v. Department of Veterans' Affairs, EEOC Request No. 05960437 (November 20, 1997); and Whitmire v. Department of the Air Force, EEOC Appeal No. 01A00340 (September 25, 2000). A complainant may establish prior EEO activity by participating at any stage of the EEO process or opposing unlawful discriminatory conduct. See, generally, Lewis v. Department of the Navy, EEOC Appeal No. 01810158 (May 22, 1981) (counseling stage); Ballard v. U.S. Postal Service, EEOC Appeal No. 01923276 (August 17, 1992) (witness); and Burrough v. U.S. Postal Service, EEOC Appeal No. 01842417 (June 24, 1986) (representative).

A complainant may also establish a *prima facie* case by presenting evidence which, if it was not explained, would reasonably give rise to an inference of reprisal. Shapiro v. Social Security Administration, EEOC Request No. 05960403 (December 6, 1996). Obviously, the complainant must offer evidence that the agency officials who took the action were aware of his or her prior participation or opposition activity (Demeier v. Department of the Air Force, EEOC Appeal No. 01A11166 (May 23, 2002)) but establishing that alone will not enable a complainant to establish the causal connection element of a *prima facie* case. Garcia-Gannon v. Department of the Air Force, EEOC Appeal No. 01821195 (June 30, 1983). Adverse actions need not be ultimate employment actions, just adverse

treatment based on a retaliatory motive, which could deter a reasonable person from engaging in protected activity. Burlington Northern Santa Fe Railway Company v. White, 548 U.S. 53 (2006); Lindsey v. U.S. Postal Service, EEOC Request No. 05980410 (November 4, 1999) and *EEOC Compliance Manual,* Section 8.0.3, Notice No. 915.003 (May 20, 1998).

The causal connection may be inferred by evidence that the protected conduct was closely followed by the adverse action. Clark County School District v. Breeden, 532 U.S. 286 (2001). The Court in Breeden noted that where a complainant is relying on temporal proximity to establish a causal connection between prior protected activity and a current adverse employment action, that proximity must be "very close" and cited with approval Circuit Court of Appeals decisions holding that time gaps of three to four months between an individual's prior EEO activity and the current adverse employment action were too attenuated to suggest an inference of retaliation. The Commission has followed suit and rendered decisions establishing much shorter time frames to establish the requisite temporal proximity. See, for example, Heads v. U.S. Postal Service, EEOC Appeal No. 01A51547 (June 2, 2005); Archibald v. Department of Housing and Urban Development, EEOC Appeal No. 01A54280 (September 22, 2005); and Lynch v. U.S. Postal Service, EEOC Appeal No. 01A24705 (August 14, 2003).

To support a finding of unlawful retaliation, there must be proof that the agency official(s) took the action at issue because of the complainant's prior protected activity and sought to deter the complainant or others. *EEOC Compliance Manual, Id.,* pp. 8-16.

Background

At all times relevant to the issue in this complaint, the complainant was employed as the Postmaster of Wamsutter, WY. (Investigative File [IF], Exhibit 1). The complainant has alleged that Manager, Labor Relations Charmaine Ehrenshaft, Manager, Post Office Operations Jarmin Smith, and former Manager, Post Office Operations Gregory Christ intentionally discriminated against the complainant by Retaliation (Prior EEO Activity) when he was forced to retire from his job as Postmaster, Englewood, Colorado, on March 31, 2010.

On December 11, 2009, the complainant was given an Investigative Interview by Mr. Knight regarding several issues in the Englewood, CO Post Office. He was also interviewed on that date by a Special Agent of the Office of the Inspector General (OIG), who was conducting an investigation as a result of a congressional inquiry they had received. The congressional inquiry was precipitated by a letter from the local branch president of the National Association of Letter Carriers (NALC) claiming, among other things, that the complainant had been delaying mail. On December 11, 2009, the complainant was given an Emergency Placement in a Non-Duty Status for disruption of day to day operations. On December 16, 2009, the complainant entered into an agreement with management, one stipulation of which was that he would retire on March 31,2010. (IF, Affidavit C, p. 7; Exhibits 3, 4).

The complainant contended that once he filed EEO Complaint No. 4E-800-0232-08 on August 14, 2008 against his former immediate supervisor Mr. Gregory

Christ, he was bullied, harassed, and insulted, resulting in a hostile work environment that continued until his allegedly forced retirement on March 31, 2010. (IF, Affidavit A, pp. 2, 3).

The complainant claimed that Mr. Christ and Mr. Jarmin Smith bullied, harassed, and threatened him about the day to day operations of his stations and about his performance. He contended that Ms. Ehrenshaft joined in the harassment in late 2008 or early 2009, going around his supervisor and giving him orders, criticizing his work and bombarding him with emails regarding the day to day operations of all post offices under his supervision. He continued that less than two (2) weeks after receiving an EEOC Acknowledgement and Order on his complaint, Ms. Ehrenshaft scheduled him for the Investigative Interview with her and Mr. Knight, which took place on December 11, 2009. The complainant alleged that they interrogated him for almost two (2) hours regarding delay of the mail, after which Special Agents from the OIG arrived. He explained that they advised him that they were investigating allegations of criminal conduct, and that he could be facing federal criminal charges of delaying the mail. He informed that he told the Agents that the charges had already been investigated and were "bogus", and they presented that the matter would be referred to the U. S. Attorney's Office, who would decide if charges would be filed. The complainant added that he was then placed on Emergency Placement in Off-Duty Status. (IF, Affidavit A, pp. 14-16; Exhibit 3).

The complainant claimed that on December 16, 2009, his representative contacted him and advised him that management had made a settlement offer, and

told him that if he did not accept it, it may be a year before he received a paycheck or a hearing on the matter. He maintained that the terms of the agreement were that the Postal Service would not pursue criminal charges against him, provided that he would take an immediate downgrade to EAS-13 Postmaster of Wamsutter, WY, without saved pay; that he did not have to report to Wamsutter until April 1, 2010; that if he did not report to Wamsutter on that date he would have to retire by March 31, 2010; and that he could take sick leave through March 31, 2010 so that he would have income. The complainant professed that he was forced to agree to the settlement offer because he could not afford to take the chance that criminal charges would be brought against him. He contended that he had no income, that he had no way to feed his family, that his home was in foreclosure, that his salary had been reduced approximately forty (40) thousand dollars a year, and that the Postal Service had created an environment so intolerable that he had to submit his retirement papers. (IF, Affidavit A, pp. 16, 17).

Prima Facie Analysis

Retaliation

As discussed previously, the complainant can make out a *prima facie* case of retaliation by showing that: (1) he engaged in prior protected activity; (2) the agency official was aware of the protected activity; (3) he was subsequently disadvantaged by an adverse employment action or adverse treatment; and (4) there is a causal link between the protected activity and adverse action/treatment. Hochstadt, *supra.*

The first element of the complainant's *prima facie* case has been met. The record shows that the

complainant engaged in prior EEO activity when he filed numerous EEO complaints, formal and informal. (IF, Exhibit 2).

The second element of the complainant's *prima facie* case has also been met. Both Ms. Ehrenshaft and Mr. Knight testified that they were aware of the complainant's prior EEO activity. (IF, Affidavit 8, p. 1; Affidavit C, p. 1).

However, the third element of the complainant's *prima facie* case has not been met. While the complainant claimed that he was forced to retire, and was thus subjected to an adverse employment action, he actually entered into a voluntary agreement which included the provision that he retire. His retirement was, therefore, his own choice and decision. (IF, Affidavit C, p. 7).

Turning to the fourth element of the complainant's *prima facie* case, it must be determined whether there is a causal link between the complainant's prior protected activity and the alleged adverse action/treatment. The Supreme Court has ruled that an inference of retaliation can be drawn from the temporal proximity between the protected activity and the adverse treatment, provided the temporal proximity is "very close." Breeden, *supra* (indicating that an inference of retaliation based on temporal proximity is not warranted if there is a three-month gap between the protected activity and the adverse treatment); see also Hendrix v. Department of the Navy, EEOC Appeal No. 01A10340 (August 8, 2001)(three month temporal relationship is insufficient to establish a causal connection).

The record shows that the complainant filed a formal EEO complaint in connection with Agency Case Number 4E-800-0232-08, the complaint he specified was the cause of the alleged retaliation, on August 14, 2008, and the last recorded activity related to that case occurred on November 13, 2008. The record also indicates that the complainant filed Agency Case Number 4E-800-0148-09 on May 14, 2009, which case was closed on August 12, 2009. The Settlement Agreement under which the complainant agreed to retire on March 31, 2010 was signed on December 16, 2009, more than thirteen (13) months after the EEO activity the complainant claimed was the reason for the alleged discrimination, and four (4) months after his most recent EEO complaint was closed. Subsequent EEO complaints post-dated the December 16, 2009 settlement agreement date. Given this history, the temporal proximity between the complainant's prior EEO activity and the adverse employment action was not sufficiently close to raise an inference of retaliation. See Dirmeier v. Department of the Air Force, EEOC Appeal No. 01A11166 (May 23, 2002). (IF, Affidavit C, p. 7; Exhibit 2, p. 4).

Although a complainant can make a *prima facie* case of retaliation based on evidence of disparate treatment (i.e., that he was treated less favorably than a similarly situated individual who refrained from engaging in EEO activity), the complainant attempted no such showing in the instant case. While the complainant is not limited to presenting comparative evidence to establish a *prima facie* case of disparate treatment discrimination, see Lipcsey v. U.S. Postal Service, EEOC Appeal No. 01981884 (January 6, 2000), he has not presented any other evidence that affords a

sufficient basis from which to draw an inference of discrimination.

Based on the analysis above, the complainant failed to establish a *prima facie* case of retaliation.

Harassment/Hostile Work Environment

In cases involving harassment, court and EEOC decisions have modified somewhat the McDonnell Douglas analytical approach in order to achieve "a sensible, orderly way to evaluate the evidence." To establish a *prima facie* case of harassment, the complainant must show: (1) membership in a protected class, (2) unwelcome personal slurs or other denigrating or insulting verbal or physical conduct, (3) that the harassment complained of was based on his membership in the protected class, and (4) that the harassment was sufficiently severe or pervasive to affect a term or condition of employment, and/or that the harassment had the purpose or effect of unreasonably interfering with his work performance and/or that the harassment had the purpose or effect of creating an intimidating, hostile, or offensive work environment. McGinnis v. Secretary of Defense, EEOC Appeal No. 01902760 (November 15, 1990); Sexton v. U. S. Marine Corps, EEOC Appeal No. 01821475 (August 30, 1983).

Record evidence and testimony disclosed that the complainant has established prong (1) of a *prima facie* case for his claims as analyzed under McDonnell Douglas, as the complainant belong to the following protected class: retaliation (prior EEO activity).

However, with regard to prong (2) there is no indication that the complainant was subjected to unwelcome personal slurs or other denigrating or

insulting verbal or physical conduct. The complainant testified that he was bullied, harassed, and insulted by Mr. Christ, Mr. Smith, and Ms. Ehrenshaft, and also "bombarded" with emails by Ms. Ehrenshaft. (IF, Affidavit A, pp. 3, 14, 15).

While the complainant made the above claims, he provided no evidence or testimony to support his allegations, no witnesses, and no copies of the emails with which he was allegedly "bombarded".

Based on the above, the complainant has not established prongs (2) or (3).

For the reasons stated below, the complainant also has not met prong (4) in that the complainant has not shown that the occurrences complained of rose to the level of discriminatory harassment.

For harassment to be considered discriminatory, it must be severe or pervasive. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). Actual psychological or emotional injury is not required. However, unless the conduct is very severe or persistent, a single incident or group of isolated incidents will not be regarded as discriminatory harassment. Scott v. Sears Roebuck and Co., 798 F.2d 210 (7th Cir. 1986); Hansen v. Rice, EEOC Appeal No. 01920621 (September 10, 1992). "Harassment, as the term is used in Title VII cases, refers to more than being subjected to stress." Lin v. U.S. Postal Service, EEOC Appeal No. 01932880 (December 23, 1993).

The following factors are pertinent to determining whether a work environment is hostile, intimidating, or abusive: (1) whether the conduct in question is verbal or physical, or both; (2) whether the conduct was repeated, and, if so, how frequently; (3) whether the

conduct was hostile or patently offensive, (4) whether the alleged harasser was a supervisor or a coworker, (5) whether more than one person joined in the harassment, and (6) whether the harassment was directed at more than one individual. King v. Hillen, 21 F.3d 1572 (Fed. Cir. 1994); Crane v. U.S. Postal Service, EEOC Appeal No. 01924585 (April 22, 1993). Evidence of the general working atmosphere involving employees other than the complainant is also relevant to the issue of whether a hostile . . . work environment exists. Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), *aff'd in relevant part and rev'd in part, sub nom* Meritor Federal Savings Bank v. Vinson, 477 U.S. 57 (1986); Delgado v. Lehman, 665 F. Supp. 460 (E.D. Va. 1987).

The conduct in question should be evaluated from the standpoint of a reasonable person, taking into account the particular context in which it occurred. Highlander v. K.F.C. National Management Co., 805 F.2d 804 (6th Cir. 1986). Conduct that is not severe or pervasive enough to create an objectively hostile or abusive environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview. Harris, 510 U.S. at 22-22. Furthermore, if the complainant does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of employment, and there is no Title VII violation. Harris, 510 U.S. 21-22. A showing of discriminatory harassment "must include discrete comments directed against the complainant or disparate treatment which supports an inference of discriminatory harassment." Lin v. U.S. Postal Service, EEOC Appeal No. 01932880 (December 23, 1993). Accordingly, it is appropriate to review a complainant's allegations under a disparate treatment

analysis where there is no direct evidence of discriminatory harassment, that is, where there is no evidence of personal slurs or other denigrating or insulting verbal or physical conduct relating to her membership in a protected class.

In the instant case, there was no showing that the events claimed by the complainant even took place. The complainant was given an Investigative Interview relative to claims that had been made against him, he was placed in a paid, non-duty status, and several days later his representative contacted management with settlement offer.

The complainant has not shown that any of the actions complained of, either individually or collectively, even occurred, much less rose to the level of discriminatory harassment.

Accordingly, the complainant has failed to establish a *prima facie* case of harassment based upon retaliation.

Management's Response

Assuming, for the sake of argument, that the complainant has established a *prima facie* case of discrimination based on reprisal, management has articulated a legitimate, nondiscriminatory explanation for their actions.

Ms. Ehrenshaft related that the complainant was given an Investigative Interview regarding several matters at the Englewood, CO Post Office, after which he was given an Emergency Placement in Non-Duty Status for disruption of day to day postal operations, consistent with *Employee and Labor Relations Manual* (ELM) Section 651.3. She advised that it was her

understanding that subsequent to that placement, his representative contacted Mr. Knight regarding a settlement agreement. She contended that the complainant was not forced to retire, but that he voluntarily signed a settlement agreement that included his retirement as one of its terms, and that he retired March 31, 2010. She continued that other than the Emergency Placement, no decisions had been made relative to the complainant before his representative contacted Mr. Knight. She averred that she made no decisions regarding the accepted issue in the instant complainant. She noted that the complainant was reassigned to the Wamsutter, WY Post Office on December 19, 2009, and was given saved pay, that is, that he maintained the same pay he had as Postmaster of Englewood, CO. (IF, Affidavit B, pp. 2, 3; Affidavit C, p. 7; Exhibit 1; Exhibit 3).

Mr. Knight testified that he gave the complainant an Investigative Interview on December 11, 2009 regarding four (4) issues: 1) that he was sexually harassing one of his managers; 2) that he was having that same manager complete his homework assignments for college courses that the Postal Service was paying for and were part of his Postal leadership Program; 3) that he failed to properly complete union grievances resulting in liability for the Postal Service; and 4) that he intentionally delayed mail receipts paid for by the NALC to alter his timeliness for answering grievances. He added that the union had requested a congressional investigation into the complainant's conduct. Mr. Knight continued that after the interview he placed the complainant on paid leave pending a formal fact finding on the charges of sexual harassment. He advised that the following day, he was

contacted by the complainant's representative who asked if the Postal Service would allow the complainant to take leave and then retire if they agreed not to take any action or charge the complainant based upon the Investigative Interview. Mr. Knight informed that an agreement was drafted and sent to the complainant's representative, who presented it to the complainant who then signed it, and the agreement was faxed back to Mr. Knight's office. He maintained that the complainant's offer of retirement in lieu of charges was accepted and incorporated into the agreement. (IF, Affidavit C, pp. 2, 7; Exhibit 4).

Mr. Knight explained that the complainant's offer to retire was accepted with the stipulation that he relinquish his then-current position as Postmaster of Englewood, CO so that the position could be filled and not be vacant for several months pending the complainant's retirement, and if he did not retire per the agreement, then he would assume another postmaster position at a lower level. He added that the complainant continued to be paid at the same level as at Englewood. (IF, Affidavit C, pp. 2, 3).

Time and Attendance Control System (TACS) records in the file established that the complainant was in a pay status continuously from December 11, 2009 through March 31, 2010, the date of his retirement even though ELM Section 519.24 provides that he could have been placed in a non-pay status pending the outcome of the investigation. Further, ELM Section 651.4 provides that employees may be immediately placed in a non-pay, non-duty status when they disrupt postal operations in any way. Also, his PS Forms 50 confirmed that he was provided with Saved Rate status when he was reassigned as Postmaster, Wamsutter,

WY, and so he continued to be paid at the same rate as when he was Postmaster of Englewood, CO. (IF, Exhibits 1, 5, 6).

Based on the evidence and testimony in the record, management responded appropriately in removing the complainant from a duty status, in investigating the charges against the complainant, and in accepting his voluntary downgrade and retirement in lieu of continuing the investigation and perhaps ultimately charging the complainant based on the outcome of the investigation.

Pretext

At this point, the complainant has the burden of proving that management's stated reason is not only pretext, but is pretext for discrimination. Tincher v. Wal-Mart Stores, Inc., 118 F.3d 1125, 1129 (7th Cir. 1997).

The complainant claimed that he was harassed, bullied, insulted, "bombarded" with emails, and forced to retire, after filing EEO Complaint No. 4E-800-0232-08 on August 14, 2008. (IF, Affidavit A, pp. 3, 14, 15).

He offered no evidence or testimony to support his allegations, while management produced a settlement agreement which the complainant signed. Although the complainant claims that he was forced to retire, he signed an agreement that included the acknowledgement that it was in the mutual interest of both parties to do so. The document speaks for itself.

The complainant's allegations are unsupported by the totality of the record. In other words, there is nothing that shows by a preponderance of the evidence that the legitimate explanations given by the Postal

Service were a pretext for discrimination. Hammons v. HUD, Request No. 05971093, EEOC Appeal No. 01955704 (August 10, 1997). Hence, management's nondiscriminatory reasons have not been proven to be a pretext for illegal discrimination.

Conclusion

After carefully considering the entire record, and applying the legal standards outlined in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F.Supp. 318 (D. Mass 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976) (applying to reprisal cases); and Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), citing Meritor Savings Bank F.S.B. v. Vinson, 477 U.S. 57 (1986) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) (applying to harassment cases); the evidence does not support a finding that the complainant was subjected to discrimination as alleged. Consequently, this complaint is now closed with a finding of no discrimination.

Statement of Relief

Because the Complainant did not prevail on his claim of discrimination, no relief is awarded.

MIXED CASE APPEAL RIGHTS

If the complainant is dissatisfied with this final agency decision, as an individual arguably entitled to appeal the issue raised in this complaint to the Merit Systems Protection Board, the complainant may appeal this decision to the Merit Systems Protection Board, **not the Equal Employment Opportunity Commission**, no later than thirty (30) days of the date of receipt of this decision. The appeal should indicate

whether the complainant desires a hearing and should be addressed to:

Merit Systems Protection Board
Denver Field Office
165 South Union Boulevard, Suite 318
Lakewood, CO 80228-2211

In lieu of an appeal to the Merit Systems Protection Board, the complainant may file a civil action in an appropriate United States District Court within thirty (30) calendar days of the date of receipt of this decision. If the complainant chooses to file a civil action, that action should be styled **Marvin C. Green v. John E. Potter, Postmaster General**. The complainant may also request the court to appoint an attorney for the complainant or to authorize the commencement of that action without the payment of fees, costs, or other security in such circumstances as the court deems just. The application must be filed within the same thirty-day time period for filing the civil action.

s/Joceline A. Height
Joceline A. Height
EEOC Services Analyst Date: August 5, 2010
NEEOISO
P.O. Box 21979
Tampa, FL 33622-1979

Enclosure: MSPB Appeal Form 185
cc:
Complainant
[redacted]
Delivery Confirmation No. 0310 1230 0000 8726 3404

Representative
John Mosby, Esq.
621 17th St., Suite 1035

Denver, CO 80293-1000
Delivery Confirmation No. 0310 1230 0000 8126 3398

District Manager, Human Resources
Colorado/Wyoming District
7500 East 53rd Pl. Room 2246
Denver, CO 80266-9994

Regional Manager, EEO Compliance and Appeals
Western Area Office
PO Box 300
Denver, CO 80201-0300

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 10-cv-02201-LTB-KMT

MARVIN GREEN,

Plaintiff,

v.

PATRICK R. DONAHOE,
POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Defendants.

ANSWER TO AMENDED COMPLAINT

Defendant, by and through undersigned counsel, hereby answers Plaintiff's Amended Complaint (Docket No. 20) as follows:

* * *

III. FACTUAL ALLEGATIONS

* * *

72. Defendant has insufficient knowledge to admit or deny the allegations contained in paragraph 72 of the Amended Complaint.

73. Defendant has insufficient knowledge to admit or deny the allegations contained in paragraph 73 of the Amended Complaint.

74. Denied.

75. Admitted that if Plaintiff did not retire and assumed work in the EAS-13 postmaster position, his

salary would be reduced. The remaining allegations in the paragraph are denied.

76. Denied.

77. Denied.

78. Admitted.

79. Defendant has insufficient knowledge to admit or deny the allegations contained in paragraph 79 of the Amended Complaint.

80. Defendant has insufficient knowledge to admit or deny the allegations contained in paragraph 80 of the Amended Complaint.

81. Defendant has insufficient knowledge to admit or deny the allegations contained in paragraph 81 of the Amended Complaint.

82. Admitted.

83. Admitted.

84. Admitted.

85. Admitted.

* * *

AFFIRMATIVE DEFENSES

1. Plaintiff fails to state a claim for which relief can be granted.

2. Defendant's actions were based on legitimate, non-discriminatory business reasons.

3. Plaintiff's claims for damages are barred in whole, or in part, because he failed to mitigate damages.

6. Plaintiff did not timely and adequately exhaust his administrative claim.

7. Plaintiff's allegedly protected activity was not the but-for cause of any actions.

8. Plaintiff's [sic] did not suffer any adverse employment action.

9. Plaintiff's compensatory damages are capped at $300,000. 42 U.S.C. § 1981a(b)(3)(D).

Dated this 14th day of November, 2011.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-02201-LTB-KMT

MARVIN GREEN,

Plaintiff,

v.

PATRICK R. DONAHOE, Postmaster General, United States Postal Service,

Defendant.

DECLARATION OF DAVID KNIGHT

I, David Knight, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge, hereby make the following declaration relating to the above-entitled matter.

* * *

42. On the day after Mr. Green's investigative interview, December 12, 2009, I received an email from Mr. Podio. In that email, Mr. Podio asked whether I would stop "any process" if he "can get marvin [Mr. Green] to retire." Attachment 5 is a true and correct copy of an email chain between me and Mr. Podio, from December 12, 2009.

43. Through emails and phone calls, Mr. Podio, on behalf of Mr. Green, and I negotiated to reach a settlement in which the Postal Service would agree not to pursue any of the issues discussed at the investigative interview and Mr. Green would agree to retire.

44. I did not negotiate the settlement agreement in retaliation for Mr. Green's prior EEO activity.

45. On December 15, 2009, I sent Mr. Podio a draft settlement agreement. Attachment 6 is a true and correct copy of the email I sent to Mr. Podio and the attached draft settlement agreement.

46. Mr. Podio requested that certain changes be made to that draft. Attachment 7 is a true and correct copy of the email I received from Mr. Podio regarding making changes to the draft settlement agreement.

47. Mr. Green, Mr. Podio and I signed the finalized settlement agreement on December 16, 2009. Attachment 8 is a true and correction copy of the signed settlement agreement.

48. The provision of the settlement agreement placing Mr. Green in the Wamsutter position pending his retirement was included so that someone could immediately step into the Englewood Postmaster position. Englewood is a large post office, and Mr. Green would be using leave and would not be retiring until March 31, 2010. I needed to place someone in the Englewood position as soon as possible to take over the responsibilities of the Postmaster job, which I could not do if Mr. Green remained in the Englewood position until March 31, 2010.

49. Mr. Green's placement in the Wamsutter position was on paper only.

50. Moreover, Mr. Green had agreed to retire effective March 31, 2010, and it was my understanding that Mr. Green would follow through on that agreement and therefore would not be reporting to the Wamsutter office on April 1, 2010. *Id.*

51. Mr. Green was not required to sign the settlement agreement, and I never told him he was required to sign it. Mr. Green could have chosen to appeal his emergency placement. He could also have chosen to wait and see what discipline, if any, resulted from any investigation into the issues discussed during his investigative interview.

52. None of the actions I took with respect to Mr. Green were in retaliation for his prior EEO activity.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 9th day of November, 2012.

s/David Knight
David Knight

From: Knight, David W - Denver, CO
To: Ehrenshaft, Charmaine A - Denver, CO
Sent: 12/12/2009 8:15:25 PM
Subject: Fw: Marvin

I am going to hell

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Sent: Sat Dec 12 19:13:24 2009
Subject: Re: Marvin

Thanks Bob. I am dead tired from working on PES for the last 24 hours. He should be extremely concerned about the delay of mail with the return receipts the DIG is all over this and the criminal issue could be a life changer. Let me know if I can help.

----- Original Message -----
From: Podio, Robert L - Pueblo, CO
To: Knight, David W - Denver, CO
Sent: Sat Dec 12 19:05:33 2009
Subject: Re: Marvin

I need to process his emergency placement you on Monday but I will continue to work on him I have a couple of discussions him today so have a little patience and I think I can make it happen
Thanks
Bob Podio Postmaster

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Cc: Ehrenshaft, Charmaine A - Denver, CO
Sent: Sat Dec 12 19:00:07 2009
Subject: Re: Marvin

This should read " if he retires immediately"

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Cc: Ehrenshaft, Charmaine A - Denver, CO
Sent: Sat Dec 12 18:37:09 2009
Subject: Re: Marvin

He will not be on admin until his vet pref starts. I will also stop any criminal charges involving the obstruction or delay of mails that may come from his interview with the DIG on 12/11/09.

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Cc: Ehrenshaft, Charmaine A - Denver, CO
Sent: Sat Dec 12 18:30:08 2009
Subject: Re: Marvin

If he retires I will not charge him.

----- Original Message -----
From: Podio, Robert L - Pueblo, CO
To: Knight, David W - Denver, CO
Sent: Sat Dec 12 12:43:33 2009
Subject: Marvin

If I can get marvin to retire will you any process you started?

54

From: Podio, Robert L - Pueblo, CO [robert.l.podio@usps.gov]
Sent: Saturday, December 12, 2009 8:24 PM
To: Knight, David W - Denver, CO
Subject: Re: Marvin

Thanks I will start to work toward that type of process Bob Podio Postmaster

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Sent: Sat Dec 12 19:22:16 2009
Subject: Re: Marvin

Yes I would do that

----- Original Message -----
From: Podio, Robert L - Pueblo, CO
To: Knight, David W - Denver, CO
Sent: Sat Dec 12 19:15:59 2009
Subject: Re: Marvin

So if I get to sign retirement paperwork say effective Feb 1 can he take sick leave until then and he can not revoke that date to retire Bob Podio Postmaster

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Cc: Ehrenshaft, Charmaine A - Denver, CO
Sent: Sat Dec 12 19:00:07 2009
Subject: Re: Marvin

This should read " if he retires immediately"

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Cc: Ehrenshaft, Charmaine A - Denver, CO
Sent: Sat Dec 12 18:37:09 2009
Subject: Re: Marvin

He will not be on admin until his vet pref starts. I will also stop any criminal charges involving the obstruction or delay of mails that may come from his interview with the OIG on 12/11/09

----- Original Message -----
From: Knight, David W - Denver, CO
To: Podio, Robert L - Pueblo, CO
Cc: Ehrenshaft, Charmaine A - Denver, CO
Sent: Sat Dec 12 18:30:08 2009
Subject: Re: Marvin

If he retires I will not charge him.

----- Original Message -----
From: Podio, Robert L - Pueblo, CO
To: Knight, David W - Denver, CO
Sent: Sat Dec 12 12:43:33 2009
Subject: Marvin

If I can get marvin to retire will you any process you started?
And are you putting on admin?
Bob Podio Postmaster

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-02201-LTB-KMT

DEPOSITION OF: AGENT WILLIAM
PATRICK MASON
April 17, 2012

MARVIN GREEN,

Plaintiff,

v.

PATRICK R. DONAHOE,
POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Defendant.

PURSUANT TO NOTICE, the deposition of AGENT WILLIAM PATRICK MASON was taken on behalf of the Plaintiff at 633 17th Street, Suite 1990, Denver, Colorado 80293, on April 17, 2012, at 12:57 p.m., before Darcy Curtis, Registered Professional Reporter and Notary Public within Colorado.

* * *

[4:1]

WHEREUPON, the following proceedings were taken pursuant to the Federal Rules of Civil Procedure.

* * * * *

AGENT WILLIAM PATRICK MASON,
having been first duly sworn to state the whole truth, testified as follows:

EXAMINATION

BY MR. MOSBY:

* * *

[19:1]

Q. Okay. And did you notice any notes in the case file?

A. No handwritten notes. We have a chron log in the case file.

Q. And were notes uploaded in this case?

A. No.

Q. How do you know that?

A. Because I reviewed the hard copy notes.

Q. Okay. If there was a dispute between what you said to Mr. Knight and say he disagreed, how would you resolve it?

MS. COHEN: Objection. Misstates prior testimony.

A. I'm not sure I understand the question.

Q. (BY MR. MOSBY) Okay. So could you look in your file to see if there's any notes from Mr. Knight?

A. Certainly I could, yes.

Q. Do you know what date you talked to Mr. Knight?

A. I believe if I did speak with – I believe I spoke with Mr. Knight the same day that I spoke with Marvin.

[20]

Q. (BY MR. MOSBY) What makes you believe that?

A. I have an entry in my chron log indicating as such.

Q. Okay. And did Mr. Knight fill you in on any details of the case?

MS. COHEN: Objection. Vague.

A. I recall, based on my notes, discussing that Mr. Green had been interviewed regarding other circumstances. I don't recall what those other circumstances were.

Q. (BY MR. MOSBY) Okay.

A. Other problems within the Postal Service.

Q. Were you aware that Mr. Knight had interviewed Mr. Green?

A. Yes.

Q. And how soon after Mr. Knight's interview ended did your start?

A. You know, I really don't recall.

Q. Did Mr. Knight tell you that he had interviewed Mr. Green?

A. I believe that, yes, he did.

Q. Okay. Did Mr. Knight tell you if there was anyone present representing Mr. Green?

A. I don't recall.

* * *

[37:1]

Q. (BY MR. MOSBY) How many times have you read Mr. Green his rights?

A. Just the one time –

Q. Oh, okay.

A. – in December of 2009.

Q. Was that on December 11?

A. I believe so.

Q. Was that at 12:39 p.m.?

A. I'm not sure.

Q. Well, isn't that the time you wrote in your notes?

A. I would have to see that.

Q. Okay. But did you, on December 11 when you interviewed Mr. Green, provide him with his rights?

A. Yes.

Q. Were they Garrity rights, or were they Miranda rights?

A. Garrity rights.

Q. Okay. Why did you provide him with Garrity rights?

A. Because he wasn't under arrest.

Q. Okay.

A. And it was part of a criminal investigation.

[38]

Q. Okay. Why was it a criminal investigation? What made it criminal?

A. Well, it was potentially – there were accusations that he was willfully delaying the mail, mistreating the mail.

* * *

[65:2]

Q. Assuming that you spoke to him afterwards, would you have indicated to him what your findings were going to be?

A. In general, with regard to cases that I work, investigative cases, it would make sense that I would pass on information to human resources or labor relations, what the findings of my case were.

Q. Did you ever pass on information to Mr. Knight or to management that you thought there was no criminal conduct in this case?

A. Again, I don't recall.

* * *

[LOGO]: United States Postal Service

AGREEMENT
BETWEEN
MARVIN GREEN & THE U.S. POSTAL SERVICE

The undersigned parties agree that it is in the mutual interest of both the Postal Service and employee, Marvin Green, to consent and adhere to the following terms and conditions:

1. Marvin Green will immediately relinquish the level 22 Postmaster job in Englewood, Colorado which he currently occupies.
2. Marvin Green will be assigned and accept placement to Wamsutter, Wyoming, EAS-13. This position shall be recorded as Mr. Green's permanent position for PS Form 50 requirements.
3. Mr. Green will receive saved salary as described in the Employee and Labor Relations Manual until March 30, 2010.
4. The agency agrees that no charges will be pursued based on the items reviewed during interviews conducted on December 11, 2009.
5. Mr. Green will be allowed to utilize forty (40) hours of annual leave, from December 14, 2009 through December 18, 2009 provided a leave slip is submitted to Post Office Operations Manager, Jarmin Smith no later than Thursday, December 17, 2009, close of business.
6. Mr. Green will be allowed to utilize sick leave, as requested, starting December 21, 2009 and running thru March 31, 2010.
7. Mr. Green agrees to retire from the Postal Service no later than March 31, 2010. Mr. Green

agrees to take all necessary steps to effect his retirement on or before March 31, 2010. If retirement from the Postal Service does not occur Mr. Green will report for duty in Wamsutter, Wyoming on April 1, 2010 and the saved salary shall immediately cease.

The undersigned parties to this agreement hereby agree to hold the terms and conditions of this agreement in strict confidence. No party shall release this agreement unless it becomes necessary to enforce this agreement. All parties agree that they have read and fully understand the agreement.

Marvin Green 12/16/09
Marvin Green Date

David Knight 12/16/2009
David Knight, Mgr.,
Human Resources/Date

Robert Podio 12/16/2009
Robert Podio, Representative/Date

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS

MARVIN GREEN, Complainant, v. JOHN E. POTTER, Postmaster General, United States Postal Service, Agency.	)	Agency Case No. 4-E-800-0700-10

DECLARATION OF ROBERT PODIO

I, Robert Podio, in accordance with the requirements of Title 28 – United States Code – Section 1746 declare, under penalty of perjury that if called to testify in this matter would state that:

1. I am the President of the Colorado Chapter of NAPUS (National Association of Postmaster of the United States). My office is located in Pueblo, Colorado.

2. In my capacity as President of NAPUS, I represent postmasters in their disputes with the Postal Service, including investigative interviews.

3. Marvin Green is a member of NAPUS.

4. In December 2009, Marvin Green contacted me and requested that I represent him at an investigative interview scheduled for December 11, 2009.

initials

5. I represented Marvin Green at the December 11, 2009 meeting, which lasted for approximately one hour. I was Mr. Green's only representative at the meeting.

6. At the conclusion of the meeting, Mr. Green was placed on emergency leave.

7. The negotiations occurred between myself and USPS over the telephone. Mr. Green was not present during any negotiations.

8. The Agreement I negotiated required Marvin Green to either retire from USPS after 36 years or alternatively, if he decided not to retire, he would be required to transfer to a lower position in Wamsutter, Wyoming and be demoted from a level 22 Postmaster to an EAS level 13.

9. USPS never required, as part of the settlement agreement, that Marvin Green or his representative waive or agree not to pursue any rights or remedies, including his right to file an EEO complaint.

Robert Podio
Robert Podio
President, Colorado
Chapter of NAPUS

3-30-10
Date

WESTERN

Reference: PRE-017721-2010

Information for Pre-Complaint Counseling

Certified Mail No.	Date Mailed or Hand Delivered on
By (Initials)	Case No. 4E-800-0119-10

On 3/22/2010 (Month, Day, Year), you requested an appointment with a Dispute Resolution Specialist.

Important: Please read. You should complete this form and return it to the EEO office within 10 calendar days of receipt. This is the only notification that you will receive regarding the necessity for you to complete this form.

Name (Last, First, MI)	Social Security	Home Telephone No.
GREEN, MARVIN C	9696	303-941-5782
Your Mailing Address: 19432 E. MILAN CIR AURORA, CO 80013-3914		Finance Number: 072880
Name of Postal Facility Where You Work: ENGLEWOOD POST OFFICE		Office Telephone No.: N/A
Address of Postal Facility: 3330 S. BROADWAY ENGLEWOOD, CO 80113-9998		Email Address: N/A

Employment Status (Check One)	Position Title	Grade Level
☐ Applicant ☐ Casual ☐ TE ☒ Career	POST MASTER	EAS-22

Pay Location	Tour	Duty Hours	Off Days (If Your Tour Shows Nights Off)	Time in Current Position
400	II	N/A	N/A	2 Years 5 Months

Your Supervisor's Name	Supervisor's Title (OM 100)	Supervisor's Telephone No.
JARMAN SMITH	MANAGER POST OFFICE OPERATIONS	(303-853-6417

Providing this information will authorize the U.S. Postal Service to send you important documents electronically.

Prohibited discrimination includes actions taken based on your Race, Color, Religion, Sex, Age (40+), National Origin, Physical and/or Mental Disability, or in Retaliation (acting based on your participation in prior EEO activity). These categories are referred to on this form as factors.

What factor(s) of Discrimination are you alleging? (Please be specific, i.e., Race-African American, Sex-Female).

RETALIATION – HARASSMENT, BULLYING, FORCED RETIREMENT FOR ENGAGING IN TITLE VII PROTECTED ACTIVITY.

For Retaliation Allegations Only. If you are alleging retaliation discrimination, provide the date(s) and specifics of the EEO activity that you feel caused you to be retaliated against.

1. On 08/14/2008 (Month, Day, Year), I engaged in EEO activity. Case No. #4E-800-0232-08
2. On 02/17/2010 (Month, Day, Year), I engaged in EEO activity. Case No. #4E-800-0070-09 OR #4E-800-0070-10

Please use the space below to briefly describe the incident or action that prompted you to seek EEO counseling at this time.

On _____ Month, Day, 20__ Year

See Attachment

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MG

PS Form 2564-A, March 2001 (Page 1 of 2)

MG Harrington
EXHIBIT NO. 25
6-18-12

Counselor's Report Page 11 of 22

Explain why, based on the factors you cited in Section B, you believe that you were treated differently than other employees or applicants in similar situations

1. _____ _____
(Name of Employee) Factor(s) that describe the employee, i.e., race (black), National Origin (Hispanic)
was treated differently than I when: _____

2. _____ _____
(Name of Employee) Factor(s) that describe the employee, i.e., sex (male), National Origin (Hispanic)
was treated differently than I when: _____

3. _____ _____
(Name of Employee) Factor(s) that describe the employee, i.e., race (black), National Origin (Hispanic)
was treated differently than I when: _____

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List the name(s) of the official(s) who took the action that prompted you to seek counseling at this time.

1a. Name DAVID KNIGHT CHARMAINE EHRENSHAFT	b. Title MANAGER HR MANAGER LABOR RELATION
c. Office COLORADO/WYOMING DISTRICT	d. Grade Level EAS-25 EAS-22
2a. Name JARMAN SMITH	b. Title MANAGER POST OFFICE OPERATION
c. Office COLORADO/WYOMING DISTRICT	d. Grade Level EAS-25

Retaliation Allegations Only: Was/were the official(s) listed in Section D above aware of your prior EEO activity?
☐ No ☐ Yes If yes, explain how the official(s) became aware: N/A

What are you seeking as a resolution to your pre-complaint?

See Attachment

Amt.

On the incident that prompted you to seek EEO counseling, have you:

1. Filed a grievance on the same issue? ☒ No ☐ Yes If yes, _____ (Date) _____ (Current Step)
2. Filed a MSPB appeal on this issue? ☒ No ☐ Yes If yes, _____ (Date Appeal Filed)

[redacted]

You have the right to remain anonymous during the pre-complaint process.

Do you desire anonymity? ☒ No ☐ Yes

[redacted]

You have the right to retain representation of your choice. (check one)

☐ I waive the right to representation at this time. ☒ I authorize the person listed below to represent me.

Name of Representative	Representative's Title
JOHN MOSBY	ATTORNEY AT LAW
Organization	**Telephone Number** / **Email Address***
	303-623-1355 / JOHN_MOSBY@MSN.COM

Mailing Address (Street or P.F. Box, City, State and Zip +4)

621 17TH STREET SUITE 1035 DENVER, CO 80293-1000

* Providing this information will authorize the U.S. Postal Service to send your representative important documents electronically.

[redacted]

Please attach any documentation you wish to submit to support your allegation(s). Include a copy of any written action(s) that caused you to seek counseling at this time.

Note: If you are alleging mental and/or physical disability, it is important for you to submit medical documentation of your disability during the pre-complaint process.

[redacted]

Privacy Act Notice. The collection of this information is authorized by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16; the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a; the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a; and Executive Order 11478, as amended. This information will be used to adjudicate complaints of alleged discrimination and to evaluate the effectiveness of the EEO program. As a routine use, this information may be disclosed to an appropriate government agency, domestic or foreign, for law enforcement purposes; where pertinent, in a legal proceeding to which the USPS is a party or has an interest; to a government agency in order to obtain information relevant to a USPS decision concerning employment, security clearances, contracts, licenses, grants, permits or other benefits; to a government agency upon its request when relevant to its decision concerning employment, security clearances, security or suitability investigations, contracts, licenses, grants or other benefits; to a congressional office at your request, to an expert, consultant or other person under contract with the USPS to fulfill an agency function; to the Federal Records Center for storage; to the Office of Management and Budget for review of private relief legislation; to an independent certified public accountant during an official audit of USPS finances; to an investigator, administrative judge or complaints examiner appointed by the Equal Employment Opportunity Commission for investigation of a formal EEO complaint under 29 CFR 1614; to the Merit Systems Protection Board or Office of Special Counsel for proceedings or investigations involving personnel practices and other matters within their jurisdiction; and to a labor organization as required by the National Labor Relations Act. Under the Privacy Act provision, the information requested is voluntary for the complainant, and for Postal Service employees and other witnesses.

[redacted]

I am aware that the claim(s) contained herein shall by-pass the pre-complaint process *if* like or related to a formal complaint that I have already filed, or *if* the claim(s) constitutes a spin-off complaint. (A spin-off complaint consists the manner in which a previously filed complaint is being processed.) In completing this PS Form 2564-A, *Information for Pre-complaint Counseling*, I recognize that the Manager, Dispute Resolution will review the claim(s) contained herein and determine how they shall be processed. I will be notified, in writing, if the Manager determines that my claim(s) shall be processed as amendments or appendages to a formal complaint that I have already filed.

Please print your name here

MARVIN GREEN

Your Signature

Marvin Green

Date signed

03/31/2010

Please return this form to:

National EEO Investigative Services Office
EEO Contact Center
U.S. Postal Service
PO Box 21979
Tampa FL 33622-1979

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NEEOISO

PS Form 2564-A, March 2001 *(Page 3 of 3)*

Counselor's Report
Page 13 of 17

EEO Forced Retirement March 31, 2010:

C. Description of Incident/Action

Since filling my charges of discrimination the Agency has engaged in harassing, bulling and attempting to force me to quit or retire. I was forced out of my job as Postmaster Englewood, CO EAS-22, by David Knight, Charmaine Ehrenshaft, and Jarman Smith or to move to the state of Wyoming about 400 miles from Denver, CO for a Postmaster position EAS-13 without save pay which would be a cut in pay of approximately $38,784.00 dollars and without any relocation cost. They also stopped my 2009, Pay-For-Performance Salary Increase that should have taken place in the month of January 2010. On December 19, 2009, David Knight, Charmaine Ehrenshaft, and Jarman Smith downgraded me to an EAS-13 Postmaster Wamsutter, Wyoming. They also used bulling, harassment, intimidation by possible criminal charges for delay of mail which I never delayed any mail in my Postal Career.

Alternatively, if I did not retire, a Criminal Attorney would cost me to start any where from $25,00.00 to $50,000.00, or if I did not retire, I was ordered to report to the Postmaster position in Wamsutter, Wyoming which is approximately 400 miles from Denver, CO, and be downgraded from a level EAS-22 to a level EAS-13, without saved pay.

F. Resolution

I am seeking full relief, including being reinstated back to full duty, promoted to the position of EAS-24 Postmaster and lost wages, attorney fees and compensatory damages.

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